Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, GEORGE PICKENS, JR.,

Petitioners,

vs.

DOANE PRODUCTS COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an admission of discrimination by one of the highest ranking agents of an employer directly involved in the promotional decision is evidence that a discriminatory reason more likely motivated the decision, and when considered with circumstantial evidence, defeats a motion for summary judgment?

II. Whether according to *St. Mary's Honor Center v. Hicks*, the lower courts exceeded their proper role by making credibility determinations and weighing evidence and concluding that the evidence of pretext did not support an inference of discrimination?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioners, Charles Edward Hightower, Curtis Williams, Harold D. Hilton, Walter J. O'Neal, Edward Browning and George Pickens, Jr., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the Court of Appeals, issued without opinion, is reported at 107 F.3d 27 and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinion of the district court in this case is reproduced at 4a.

STATEMENT OF JURISDICTION

The Court of Appeals denied the appellants petition for rehearing/suggestion for rehearing *en banc* on April 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") is set forth below:

> § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

> against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

In 1983 Doane purchased a dog food manufacturing plant in Birmingham, Alabama. In order to bring the Birmingham plant up to the standards of their other manufacturing plants around the country, Doane upgraded the educational requirements for the lab technician positions ("QC Tech"). From 1983 until 1993 all of the blacks hired in the lab possessed at least three years of college with all but one having a full four-year degree. The appellants were told that they did not possess the education demanded of a QC Tech and were also led to believe that a position as a QC Tech was a "stepping stone" to management with Doane, and therefore, appellees believed that they were precluded from reaching Doane's management level.

On October 27, 1993, Kenny Dees, a white male, interviewed for a QC Tech position and was subsequently awarded the position. The only notification of the opening was a "blind ad." Dees was regular laborer at Doane for two years prior to the interview. He did not have a college education, had no education in chemistry and had only briefly studied drafting.

The Union workers, including the appellants, became very disturbed when they learned that Kenny Dees, a "questionably qualified" white union worker, was offered this position. Accordingly, Bobby McAnnally, Doane's Birmingham Plant Manager, contacted Doane's corporate office in Joplin, Missouri, concerning this matter. (R1-13 Tab 9, Clements' Depo. p. 21, 22)[1]. McAnnally spoke with Earl Clements who is the Vice-President of Production for all of Doane's eleven manufacturing plants. (*Id.* at 8). Regarding this conversation between Clements and McAnnally, Clements testified at deposition as follows:

> Q. (BY BOB KIRBY) The first you heard about the Kenny Dees problem was what?
>
> A. Was when Bobby called me in Joplin and said, "Earl, we're — you know, we were all set to — they were going to move Kenny Dees into QC and Harold said that we can't do that and — based on an agreement." So I said, "Well, not that I'm aware of." But I said, "Let me go through all my old files." And that's when I dug out the old agreement and, you know, read it and I said, "Bobby, I just — the way I read this agreement is you can —you know, that they took the QC or lab techs out of the bargaining unit, but not that we can't hire anyone out of the bargaining unit into the position."

---

1. The record on appeal in this matter consists of: one (1) volume of pleadings and two (2) folders which contain documents #13 and #17. Since the single volume of pleadings does not contain any other documents bearing the numbers 13 and 17, this writer will cite to all references in the record using "R1" followed by the document number and the page number within that document.

> So — but that's why as you've referred to today in a couple of conversations, you know, the delay then with Kenny Dees putting him into the job was we was — we were going to try to get it, I guess, addressed and handled and tone down the friction over that position but it didn't work.
>
> Q. What did you do in an attempt — what was your first advice to the people down here as to how to handle the situation?
>
> A. I told Bobby, let's not — let's not move on it right now. Let me, you know, read this thing over. Let me discuss it with, you know, with Bob, my boss, Robinson who is president. And I said, you know, see if he knows of any different — or anything that has ever been said otherwise.
>
> But I said, "Based on what I'm reading on this agreement, that's not the case." I discussed it with Bob and, you know, he felt the same way. And then I called Radford Tidwell and said, "Radford, I guess we've got a problem out here at the plant." And he said, "Yeah, I've already heard about it."

(R1-13 Tab 9, Clements' Depo. p. 22-24)[2]. Doane then informed Dees that he could not begin his new position until the grievance was resolved. (R1-17-144 to 146). Dees threatened Doane, "If this keeps up, I'll go seek legal counsel." (*Id.*). Earl Clements further testified:

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2. Clements' Depo. pp. 21-24 is reproduced in the appendix filed herewith at 45a-48a.

> Q. (BY BOB KIRBY) Then what was the next step that you took?
>
> A. Then, you know, we reviewed it and Bobby and them, I think, had a grievance meeting over it and tried to address it regarding, guys, you know, that this agreement isn't saying that we can't move people out of the plant, but it didn't resolve it. *And that is when I told Bobby go ahead and put Kenny in the position*, and we'll just have to go to the next step, which was the next -- the third-step grievance meeting, and then I came down for it. (emphasis added).

(*Id*). Accordingly, on November 29, 1993, Dees began his new position with Doane. On this same day, the Appellants filed an official grievance over this promotion. (R-13-27, 28).

On or about March 1, 1994, a grievance meeting ensued concerning the charge of race discrimination filed on November 29, 1993, and resulting from the hiring of Kenny Dees into the QC Tech position. (R1-22-60, 61). Numerous people were present at this meeting, including James Cunningham, union president Harold Hilton and Earl Clements. (*Id.*). During the course of the meeting, a union member asked a question of Clements regarding Doane's discriminating against the black employees by holding them to higher educational requirements. (*Id.*). Clements' reply was that they (the company) might have "discriminated a little bit but we can correct that." (*Id.*; R1-17-367, 368, Cunningham Affidavit).[3]

As a result of action that occurred in 1993 concerning the

3. James Cunningham's Affidavit is reproduced in the appendix filed herewith at 43a-44a.

QC Tech position, the Appellants filed charges with the EEOC against Doane Products Company during February, 1994. The charges concerned the promotion of a white bargaining unit employee, Kenny Dees, into the position of quality control technician (QC Tech).

The appellants stated that Doane lowered the job qualifications for a non-minority; or, that Doane held the minorities to a higher standard that the non-minorities by requiring the minorities to possess higher educational requirements than those possessed by non-minorities in order to obtain a QC Tech position.

On March 27, 1994, an arbitrator issued a decision denying the appellants' grievance and on December, 8, 1994, the EEOC issued Right to Sue Letters to the appellants named in this action. The appellants commenced suit on March 3, 1995, alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Civil Rights Act of 1991. The appellants maintained that, because of their race, they had been denied promotions to the positions of QC Tech and supervisor. Doane filed a motion for summary judgment on January 12, 1996, which the Honorable James H. Hancock, United States District Judge for the Northern District of Alabama, granted on April 5, 1996.

The district court dismissed the action and held that the appellants did not present a prima facie case because they all did not "apply" for the QC Tech position[4]. It held that Doane

4. Although the evidence submitted by appellants in connection with the prima facie case should be considered in evaluating whether a reasonable jury could disbelieve Doane's proposed nondiscriminatory reasons for Dees' promotion, the appellants will not argue, at this stage, the *existence* of the *prima facie* case itself based on the authority of *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-15, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1983).

offered a legitimate, race-neutral reason for its decision to promote Dees. The appellants presented evidence to the court that one of the highest ranking officials of Doane (who was directly involved in the promotion decision) admitted the discrimination; that, Doane lessened its job requirements for non-minorities; that, the manufacturing plant was comprised of a majority of black laborers governed by white management; and, that Doane allowed white employees to construct a shower on the premises when the blacks had asked for years, and been denied, permission to construct a shower for the labor unit.

The court said that the appellants failed to provide a "sufficient factual basis in the record upon which a reasonable trier of fact could find that the stated reasons for the adverse employment actions are pretext," and that they "failed to show that the promotional decisions . . . were the result of discriminatory animus rather than legitimate business decisions."

Therefore, on April 24, 1996, the appellants filed notice of appeal to the Eleventh Circuit Court of Appeals. On January 16, 1997, the Court heard oral argument from the parties to the appeal. On January 29, 1997, the Court issued an order, without opinion, affirming the district court's order granting summary judgment pursuant to Eleventh Circuit Rule 36-1. The appellants filed a petition for rehearing/suggestion for rehearing en banc on February 20, 1997, which the appeals court denied on April 5, 1997.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve much confusion between the federal circuit courts of appeals on the question of how the *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), decision on "shifting burdens" affects the summary judgment procedure

in cases of discrimination. Without specific guidance in this area, the various lower courts have issued conflicting opinions, both among the circuits and within the individual circuits, as to the evidence necessary for a plaintiff to defeat summary judgment.

Nine circuits interpret *Hicks* to mean that evidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's prima facie case, is sufficient to support a finding of discrimination and defeat summary judgment. *See, e.g., EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) ("A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination."); *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc) ("[T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination."); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (considering two questions at summary judgment: (1) the prima facie case and (2) "whether [the plaintiff] has shown that there is a genuine dispute of material fact about [the defendant's] proffered explanation for the discharge"); *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("[T]he only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury must draw, to a permissive one the jury may draw, provided that the jury finds the employer's explanation 'unworthy' of belief."); *Perdomo v. Browner*, 67 F.3d 140, 146 (7th Cir. 1995) ("The district court found Perdomo's [direct] evidence of racial discrimination unpersuasive, but . . . such evidence is not required: the trier of

fact is permitted to infer discrimination from a finding that the employer's proffered reason was spurious."); *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1110 (8th Cir.) ("The elements of the plaintiff's prima facie case are thus present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The 'ultimate question' of discrimination must therefore be left to the trier of fact to decide."), *cert. denied*, 513 U.S. 946, 115 S. Ct. 355, 130 L. Ed. 2d 310 (1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed."); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("A plaintiff in a discrimination case based on circumstantial evidence can avoid judgment as a matter of law by putting on a prima facie case and by producing evidence sufficient to discredit in the mind of a reasonable juror all of the defendant's proffered nondiscriminatory reasons for its actions.).[5]; *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("According to Hicks, a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination.").

The First and Fifth Circuits have issued opinions expressing a contrary view. In *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994), the First Circuit stated that proof of pretext will not always shield a plaintiff from summary judgment, *Id.* at 260 n.3, but held only that the defendant in that case was entitled to summary judgment because the plaintiff had presented "no evidence . . . to rebut [the defendant's] assertion that those hired were more qualified," *Id.* at 262.

5. The differing views existing within the Eleventh Circuit prior to *Combs*, are discussed at length in *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997).

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), the Fifth Circuit's decision affirmed judgment in favor of an employee in an age discrimination case, but contained discussion that is inconsistent with the *Hicks* rule and nine other circuits. Although the *Rhodes* opinion states that under *Hicks*, "Evidence of pretext will permit a trier of fact to infer that the discrimination was intentional," *Id.* at 993, it also states that "[i]t is unclear . . . whether the [Supreme] Court intended that in all such cases in which an inference of discrimination is permitted, a verdict of discrimination is necessarily supported by sufficient evidence," *Id.* Additionally, "[w]e are convinced that ordinarily such verdicts would be supported by sufficient evidence, but not always." *Id.*

In the present case, the United States Court of Appeals for the Eleventh Circuit adopts and affirms the district court's decision and forty page memorandum opinion granting summary judgment on the basis that appellants failed to "show" or "prove" discrimination. A close examination of the district court's opinion reveals the danger of continued uncertainty as to how *Hicks* applies in summary judgment procedure. If this issue remains unclarified, discrimination victims stand to lose the benefits of the *Hicks* decision because their cases will be arbitrarily dismissed on summary judgment by district courts unclear as to the proper standards.

I.

AN ADMISSION OF DISCRIMINATION BY ONE OF THE HIGHEST RANKING AGENTS OF AN EMPLOYER DIRECTLY INVOLVED IN THE PROMOTIONAL DECISION IS EVIDENCE THAT A DISCRIMINATORY REASON MORE LIKELY MOTIVATED THE DECISION, AND WHEN CONSIDERED WITH CIRCUMSTANTIAL EVIDENCE, DEFEATS A MOTION FOR SUMMARY JUDGMENT.

In appellants initial appeal to the district court, they argued that Earl Clements' comment was admissible and highly relevant evidence of intentional discrimination, and when considered with other factors, was sufficient to show pretext and overcome summary judgment. During oral argument on January 16, 1997, appellants brought this evidence to the panel's attention. On application for rehearing, the appellants made the Court clearly aware of the governing and deciding role Clements played in the decision to promote Dees. Clements made the final decision. While acting on behalf of Doane, he admitted discrimination. Appellants maintain that this comment is an admission of guilt made by one of the highest ranking representatives of Doane involved in the promotion decision, and made while acting within the scope of his authority. The comment is admissible, highly relevant, and when considered with other circumstantial evidence, is sufficient to permit a reasonable juror to find Doane's explanation is unworthy of credence.

First, the statement made by Earl Clements is admissible as it concerns a matter within Clements' scope of authority. Federal Rules of Evidence, Rule 801(d)(2)(D) provides that a statement is not hearsay if it is offered against a party and is a "statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence

of the relationship." Fed. R. Evid. 801(d)(2)(D). After the filing of the appellants' grievance over the hiring of non-minority Kenny Dees, Earl Clements came from Joplin, Missouri, to Birmingham to attend a grievance meeting. Earl Clements is Doane's Vice President of Production for all of Doane's eleven manufacturing plants. He reports only to the President of the company and is clearly a member of upper management. Furthermore, he was sent to Birmingham to represent Doane at the grievance meeting. The statement he made that the company may have, "discriminated a little bit but we can correct that," was within his scope of authority concerning the grievance over the controversial employment action which he participated in and is therefore, non-hearsay.

Second, the statement made by Earl Clements is admissible as he was involved in the final decision to place Kenny Dees in the controversial employment position. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 1804-05, 104 L. Ed. 2d 268 (1989). Kenny Dees resigned from his position in the bargaining unit on November 26, 1993. The Union workers complained when they learned that Kenny Dees had been offered a position as QC Tech. Bobby McAnnally then contacted Doane's corporate office in Joplin, Missouri, and spoke with Earl Clements. Following his conversation with Earl Clements, there was a delay in Dees starting his new position because Clements was, "[G]oing to try to get it [sic] addressed and handled and tone down the friction over that position but it didn't work."

Clements told McAnnally to not move on it immediately to allow him to discuss the matter with Doane's President. Following his conversation with the President, Clements told the Birmingham Plant Manager, McAnnally, to go ahead and put Dees in the position and said, "[W]e'll just have to go to the next step." Earl Clements gave the final order to place Dees

into the position of QC Tech after being apprised of the controversy over the situation. According to Clements' testimony, Bobby McAnnally, Birmingham Plant Manager, and the President of Doane were also consulted regarding this decision. Because of Clements' authority at the time he made the comment about discrimination and his clear involvement in the decision making process, his statement is highly relevant in the discrimination context.

Third, the issue of Clements' admission of discrimination was raised in appellants' motion in opposition to summary judgment at the district court level. The District Court found that the statement did not rise to the level of direct evidence of discrimination and that it lacked the requisite nexus to the promotional decision. The Appellants maintain that Clements' statement is significant evidence that Doane knowingly and intentionally discriminated against the appellants. The appellants' presented other circumstantial evidence in their appeal which also demonstrate pretext. The other evidence includes: (1) a noted animosity between the labor unit and the management[6]; (2) allowing whites to construct a shower on premises when the minorities had asked to build a shower for years and had repeatedly been denied permission; (2) an 85% black general work force governed by an 85% white management staff; (3) McAnnally's failure to hire (or promote) any blacks as a QC Tech or supervisor, from the beginning of his employment to the time the appellants filed a grievance; and (4) Doane's lessening the QC Tech educational requirements for a white job-applicant. These facts, when considered with the admission of discrimination made by Earl Clements, which in and of itself states volumes about the climate in that plant, create a genuine factual issue sufficient to overcome summary judgment.

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6. Earl Clements testified in deposition that there was a "[l]ot of friction between the management and the employees — I mean you could see it from the time — my very first trip down here.:" (R1-13-121).

II.

ACCORDING TO *ST. MARY'S HONOR CENTER V. HICKS*, THE LOWER COURTS EXCEEDED THEIR PROPER ROLE BY MAKING CREDIBILITY DETERMINATIONS AND WEIGHING EVIDENCE AND CONCLUDING THAT THE EVIDENCE OF PRETEXT DID NOT SUPPORT AN INFERENCE OF DISCRIMINATION.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), this Honorable Court explained that disbelief of the employer's proffered reasons, in tandem with the plaintiff's prima facie case, is sufficient to permit the factfinder to *infer* discrimination. The Court said:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required."

Id. at 511, 113 S. Ct. at 2749 (quoting *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992)) (footnote omitted). Shortly after the *Hicks* decision, the Eleventh Circuit had the opportunity to apply the standards in *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993). In *Hairston*, the district court granted summary judgment for

the defendant-employer. The court of appeals reversed and stated:

> The plaintiff may succeed by directly persuading the court at trial that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the prima facie case.
>
> . . . .
>
> [P]laintiff's burden at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext. . . .

Id. at 920-21 (citations omitted). Because the plaintiff in *Hairston* had submitted sufficient evidence to permit the factfinder to find that the employer's proffered reasons were pretextual, the court found it was error for the district court to grant summary judgment. *Id.* at 921.

Therefore, following *Hicks*, the *Hairston* court held that one way a plaintiff may succeed in establishing discrimination is by showing that the employer's proffered explanations are not credible. As was explained in that decision, once the plaintiff introduces evidence sufficient to permit the factfinder to disbelieve the employer's proffered explanations, summary

judgment is not appropriate, because "[i]ssues of fact and sufficiency of evidence are properly reserved for the jury." Nothing else is required for the plaintiff to avoid summary judgment. *Id.* at 921.

In 1995, the courts deviated from the rules set forth in *Hicks* and followed by *Hairston*, and affirmed the grant of judgment as a matter of law in favor of an employer in an age and sex discrimination case, even though the plaintiff had established a prima facie case and had put on evidence sufficient to permit the factfinder to disbelieve all of the employer's proffered reasons for the adverse employment action. *Walker v. NationsBank of Florida*, 53 F.3d 1548, 1556-58 (11th Cir. 1995). The *Walker* panel said that "Walker did not produce evidence that raised a suspicion of mendacity sufficient to permit us to find on this record that the bank intentionally discriminated against her on the basis of age and/or sex." *Id.* at 1558. The court held that "[r]easonable and fair-minded persons, in the exercise of impartial judgment, would not conclude that the bank had discriminated against [the plaintiff] on the basis of her age or sex." *Id.*

In the present case, the district court appears to have followed the incorrect standard set forth in *Walker*, instead of following *Hicks* and *Hairston*. On page twenty-three of the district court's opinion the court states, "[T]he sole inquiry is whether the plaintiff successfully carries the burden of persuading the trier of fact that the defendant engaged in intentional discrimination on the basis of a prohibited factor." Also, on page thirty-four, "[T]he sole inquiry is whether the plaintiffs have presented substantial evidence that they were the victims of intentional discrimination . . . plaintiff must present concrete evidence in the form of specific facts which *show* that the defendant's proffered reasons are pretext." Finally on page thirty-seven the district court concludes that, "the plaintiffs have failed to *show*

that the promotional decisions at issue . . . were the result of discriminatory animus rather than legitimate business decisions."

The district court required the plaintiffs to "show" or "prove" discrimination at the summary judgment stage rather than following the precedent of *Hicks* and making a determination of whether or not a reasonable jury *could* conclude, or infer from the evidence, that Doane's proffered explanation was not the true reason for the promotional decision. The district court and the circuit court exceeded their proper roles in this case and wrongfully denied the appellants their right to a trial.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 29, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6399

D.C. Docket No. CV95-H-525-S

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, GEORGE PICKENS, JR.,

Plaintiffs-Appellants,

versus

DOANE PRODUCTS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(January 29, 1997)

Before COX, Circuit Judge, KRAVITCH*, Senior Circuit Judge, STAGG**, Senior District Judge.

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* Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997.

** Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

Appendix A

PER CURIAM: AFFIRMED. *See* 11th Cir. Rule 36-1.[1]

"Costs taxed against plaintiffs-appellants."

Judgment Entered: January 29, 1997
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 4/18/97

1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous:
>
> (b) the evidence in support of a jury verdict is sufficient:
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) the judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED APRIL 5, 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV95-H-525-S

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, GEORGE PICKENS, JR.,

PLAINTIFFS,

vs.

DOANE PRODUCTS COMPANY,

DEFENDANT.

ORDER GRANTING FINAL SUMMARY JUDGMENT

In accordance with the memorandum of decision this day entered, it is ORDERED, ADJUDGED and DECREED that the motion for summary judgment filed by defendant Doane Products Company is GRANTED, and judgment in favor of said defendant is hereby ENTERED. Costs are taxed against the plaintiffs.

DONE this 5th day of April, 1996.

s/ James H. Hancoch
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED APRIL 5, 1996

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV95-H-525-S

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, GEORGE PICKENS, JR.,

PLAINTIFFS,

VS.

DOANE PRODUCTS COMPANY,

DEFENDANT.

MEMORANDUM OF DECISION

The court has before it the January 12, 1996 motion for summary judgment filed by defendant Doane Products Company ("defendant"). Pursuant to the court's January 16, 1996 order, the motion was deemed submitted for decision, without oral argument, as of February 13, 1996.[1]

1. In support of the motion for summary judgment, defendant filed a brief and the following evidence: (1) the affidavit of Earl Ray Clements; (2) the affidavit of Mark Holloway; (3) the affidavit of Morris Jones; (4) the affidavit of Carol Koch; (5) the affidavit of Bobby McAnnally; (6) the affidavit of Bill McLeod; (7) the affidavit of Howard Nichols; (8) excerpts

(Cont'd)

Appendix C

Plaintiffs Charles Hightower ("Hightower"), Curtis Williams ("Wiliams"), Harold Hilton ("Hilton"), Walter O'Neal ("O'Neal"), Edward Browning ("Browning"), and George Pickens, Jr. ("Pickens") (collectively "plaintiffs") are long-standing bargaining unit employees of defendant. They initiated this action on March 3, 1995 by filing a complaint pursuant to

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(Cont'd)
and exhibits from the deposition of Eddie Browning; (9) excerpts and exhibits from the deposition of Earl Ray Clements; (10) excerpts and exhibits from the deposition of Kenneth Dees; (11) excerpts and exhibits from the deposition of Charles Hightower; (12) excerpts and exhibits from the deposition of Harold Hilton; (13) excerpts and exhibits from the deposition of Bobby McAnnally; (14) excerpts and exhibits from the deposition of Howard Nichols; (15) excerpts and exhibits from the deposition of Walter O'Neal; (16) excerpts and exhibits from the deposition of George Pickens, Jr.; (17) excerpts from the deposition of Herbert Tessereau; (18) excerpts and exhibits from the deposition of Stephen Wawrzyniak; and (19) excerpts and exhibits from the deposition of Curtis Williams.

In opposition to the motion, plaintiffs filed a brief and the following evidence: (1) the affidavit of Norah Caves; (2) the affidavit of Eddie Browning; (3) the affidavits of Charles Hightower; (4) the affidavits of Harold Hilton; (5) the affidavit of Walter O'Neal; (6) the affidavit of George Pickens, Jr.; (7) the affidavit of Curtis Williams; (8) excerpts and exhibits from the deposition of Eddie Browning; (9) excerpts and exhibits from the deposition of Earl Ray Clements; (10) excerpts and exhibits from the deposition of Kenneth Dees; (11) excerpts and exhibits from the deposition of Charles Hightower; (12) excerpts and exhibits from the deposition of Harold Hilton; (13) excerpts and exhibits from the deposition of Bobby McAnnally; (14) excerpts and exhibits from the deposition of Howard Nichols; (15) excerpts and exhibits from the deposition of Walter O'Neal; (16) excerpts and exhibits from the deposition of George Pickens, Jr.; (17) excerpts and exhibits from the deposition of Herbert Tessereau; (18) excerpts and exhibits from the deposition of Stephen Wawrzyniak; (19) excerpts and exhibits from the deposition of Curtis Williams.

Appendix C

Title VII of the Civil Rights and 42 U.S.C. § 1981 alleging that defendant discriminated "on the basis of race against the plaintiffs with respect to evaluations, wages/compensation, promotions, job assignments, discharge, demotions, off-time, training, transfers, hiring, supervision and other terms, conditions and privileges of employment." (*See* Complaint at ¶ 14).

Unfortunately, from the briefs submitted, the court feels as if it has entered in the fourth act of a five act play. This feeling derives not only from the fact that the first three acts occurred over twelve years ago in 1983, but also because the parties' presentation of the facts is not of much aid to one unfamiliar with the story.

Further, upon first reading the briefs, the court reviewed the complaint again to make sure this was not a breach of collective bargaining agreement case. Although the complaint states that this is a Title VII race discrimination suit, the court feels as if it is pitched in terms of a labor dispute. In any case, the court will, from the evidence submitted, try to piece the story together as best it can.

Defendant manufactures pet food in approximately ten plants located across the country. In 1983, defendant purchased Cosby-Hodges Milling Company, a plant in Birmingham, Alabama that produced pet food and livestock feed. (McAnnally Aff., Ex. 1). The Cosby-Hodge employees were represented by the United Wholesale & Warehouse Employees Union ("the union"). Defendant employed the existing workforce and recognized the union. Thus, the labor agreement, with its bona fide seniority system, continued in force. (*Id.*).

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Defendant perceived that Cosby-Hodges quality control standards were inferior to the standards in defendant's other plants. (Wawrzyniak Depo. at pp. 13, 15). In its other plants, defendant had quality control technicians ("QC Techs") managed by a quality control ("QC") coordinator. The QC department in each plant operates separately and independently of the plant manager and management personnel and reports only to the quality control director at the home office. (Tessereau Depo. at p. 29; Wawrzyniak Depo. at p. 22; Nichols Depo. at p. 49; McAnnally Depo. at pp. 11-12, 15-16; Koch Aff.). Defendant has maintained the QC departments separately to ensure proper levels of quality control by keeping QC Techs free of any conflict of interest from plant management or a union in making quality control decisions. (McAnnally Aff., Ex.s 1 & 3; Clements Depo., Ex. 1).

Prior to defendant's purchase, all quality control work for Cosby-Hodges was performed by Lab Tech employees. The Lab Tech position was part of the bargaining unit, and, therefore, the position was subject to the seniority bid system. After defendant purchased the plant, it removed the Lab Tech position and created the QC Tech position in the Birmingham plant to correspond with the QC Tech position in its other plants. In keeping with the way it handled quality control in its other plants, defendant placed the QC Techs in the Birmingham plant outside of the command of both the management and the union to fulfill its goal of avoiding pressure and bias in decisions affecting product quality. (Koch Aff. at p. 2). Thus, the new QC Tech position in the Birmingham plant was not part of the bargaining unit.

The QC Tech position involved different and additional responsibilities from the Lab Tech position. (Morris Jones Aff.;

Wawrzyniak Depo. at pp. 13, 15-17). Defendant started microbiological sampling, moisture testing, and tests for micro toxins. (Dees Depo. at pp. 80-82, 131-32; Wawrzyniak Depo. at p. 17). In 1987, defendant also invested several million dollars in overhauling the plant and updating the laboratory equipment. (Tessereau Depo. at pp. 8, 9, 12; Wawrzyniak Depo. at p. 22; McAnnally Aff.). Part of this overhaul included adding a machine called a Technicon infrared analyzer to measure the protein, moisture and fat content of the pet food being manufactured. (Wawrzyniak Depo. at p. 16; Dees Depo. at pp. 14, 26, 28, 79-82). Thus, the QC Techs were required to be familiar with preparation of samples, proper use of the equipment, and completing the necessary paperwork in conjunction with the testing. (Dees Depo. at pp. 14, 26, 28, 79-83, 86-87). This rigorous testing was necessary for many of defendant's private label customers who evaluated and precertified the QC programs of their suppliers before agreeing to have defendant manufacture their pet food. (Wawryzniak Depo. at pp. 15-16). Due to the extensive changes in the laboratory, the equipment, and the testing, an individual who was familiar with the Lab Tech job at Cosby-Hodges would not necessarily know how to perform the QC Tech position. (McAnnally Aff.; Dees Depo. at pp. 88, 139; Jones Aff.)

Because of the creation of the new QC Tech position, two Lab Techs, Charles Hightower and Don Hudson, were transferred from the lab and reassigned to different jobs at the plant that were within the bargaining unit. In addition, the premix men who helped the Lab Techs were also transferred. Mr. Hightower and Mr. Hudson filed a grievance through the union on September 26, 1983 protesting their reassignment. The parties to the grievance negotiated a settlement whereby the QC Tech position would remain outside the bargaining unit,

however, the premix duties that were formerly performed by the Lab Techs would become a separate position that would remain a part of the bargaining unit. (Clements Depo., Ex. 1; McAnnally Aff., Ex. 3). Specifically, the settlement states:

> Whereas, since the present contract was negotiated and became effective January 16, 1983, the company, Cosby-Hodges Milling Company was purchased by Doane Products Company, and
>
> Whereas, Doane Products Company has a Quality Control program in its operations that is both an effective cost control and a quality producing program which is essential to being successful and profitable in the market, and
>
> Whereas, such Quality Control at Cosby-Hodges was almost non-existent as expected and demanded by Doane Products Company, and
>
> Whereas, Doane Products Company is presently making the necessary changes at Cosby-Hodges to accomplish this goal, the following changes as it affects the duties of the Bargaining Unit Employees are necessary.
>
> The company must have qualified Quality Control Technicians including among other things, certain formal education in chemistry,

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> etc. These Quality Control Technicians must do some work formerly done by Bargaining Unit Employees, such as testing, gathering sample, calibrating machinery, inspecting, etc.
>
> The "Lab Technician" classification in the contract will by abolished and the Quality Control Technicians presently working or hired in the future will not be Bargaining Unit Employees and their jobs will not be subject to bid. They will not be represented by the union and thus not covered by any provision of the contract. This is necessary also because of the nature of the job inasmuch as to assure that a Quality Control Technician is properly performing his/her duties he/she must gather their own samples at times, make their own visual observance at times and make out the necessary adjustments to assure a controlled cost quality product.
>
> The classification of "Pre-Mix" — Bag Room Operator" and job of same will remain a bargaining unit job and be covered by all provisions of the contract. . . .

(McAnnally Aff., Ex. 1).

The following is a description of the individuals employed as QC Techs in the Birmingham plant since the position was created in 1983 until the time of this suit in 1995:

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Name	Race	Years	Educational background
1) Fred Thompson	Black	1983	B.S. Biology, minor in Chemistry
2) Elmer Sherman	Black	1984-87	B.S. Animal & Dairy Science - including college chemistry
3) Rod Bobbs	Black	?-1990	3+ years college
4) James McHellon	Black	1985-87	B.S. Chemistry
5) James Perdue	Black	1985 to present	B.S. management, 2 college biology courses
6) Travis Lucas	White	1987	B.S. Animal & Dairy Science - including college chemistry
7) Gerson Lee	Black	1987-90	H.S. diploma - completed Radiology Technician during last 2 years including chemistry
8) Scott Stewart	White	1990-91	B.S. Marketing - no chemistry
9) Bill McLeod	White	1990-94	1 1/2 years college - no chemistry, 3 years experience supervisor Sirco Systems

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10) Mark Holloway	White	1991-93	2 years college, including chemistry
11) Kenneth Dees	White	1993-95	1 year college - certified Emergency Medical Technician - H.S. chemistry - 4 years experience in pet food laboratory
12) Arthur Kendrick	Black	1994-95	B.S degree including chemistry
13) Robin Sims	Black	1994 to present	
14) Calvin Saxton	Black	1994 to present	

(McAnnally Aff). The QC Tech position was filled by placing advertisements in the newspaper. (Nichols Depo. at pp. 22-23). Originally the advertisements requested an applicant with a college education. Mr. Nichols, the QC Coordinator for the Birmingham plant, testified that by 1987 the ads no longer had any requirement of college education because they did not want to limit the potential applicants by requiring college especially at the rate of pay that the job offered. (Nichols Depo. at pp. 25-27). Mr. Nichols stated that he did not tell anyone in the bargaining unit that two years of college was required for the QC Tech position. (Nichols Depo. at p. 58; McAnnally Aff., Ex.1 at pp. 4-5).

Of the fourteen QC Techs hired, nine have been black and five have been white. Although at least six of those hired studied

some college level chemistry, there are others of both races who did not.

Neither the union nor the plaintiffs have complained about the manner in which the QC Tech position has been filled from the time of the 1983 grievance settlement until ten years later in 1993 when defendant placed Mr. Kenny Dees, a white union employee, into the QC Tech position. Mr. Dees was originally hired as a table man for defendant, a position that was part of the bargaining unit. He remained employed in bargaining unit positions for two years prior to being hired as a QC Tech. Plaintiffs alleged that because Mr. Dees did not have any college chemistry and had only one year of college work in a drafting program and training as an emergency medical technician, defendant lowered the educational standards for Mr. Dees because he was white. Plaintiffs also complained that they were told that the QC Techs would not be hired from the bargaining unit, and Mr. Dees was a union employee at the time he was hired to be a QC Tech.[2]

On November 29, 1993, plaintiff Hilton filed a grievance related to the hiring of Kenny Dees for the QC Tech position. (McAnnally Aff., Ex. at p. 1). Plaintiff Hilton alleged that defendant lowered the requirements for the QC Tech position in violation of the 1983 grievance settlement. (*Id.*). The union alleged that from thenceforth the QC Tech position should be placed within the bargaining unit and reassigned to the former Lab Tech position, thereby requiring all future vacancies for the position to be filled through the union bid process. (*Id.*).

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2. Plaintiffs make much of the fact that Mr. Dees resigned from the union before starting in the QC Tech position. However, Mr. Dees testified that no one told him that he had to resign from the union to work as a QC Tech, he merely resigned because he though it was best to do so. (Dees Depo. at pp. 66, 68, 73).

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A hearing was held by an arbitrator on March 1, 1994. The union contended that defendant violated the 1983 settlement agreement and that the agreement was induced through misrepresentations of fact. Specifically, the union alleged that the old Lab Tech position and the QC Tech position were "indistinguishable" except that some modern equipment purchased by defendant made the job easier to perform. The union also alleged that by relaxing the qualifications of those performing the QC Tech job, specifically Kenny Dees, defendant eliminated the need for the job to be outside the bargaining unit. In addition, the union claimed that defendant maintained a "double standard" requiring a greater level of qualifications from black applicants than from white applicants. Lastly, the union sought to have Kenny Dees removed from the QC Tech job "because he was promoted as a result of personal friendship and favoritism on the part of plant manager Bobby McAnnally." (McAnnally Aff., Ex. 1 at pp. 5-6).

On April 29, 1994, the arbitrator issued a decision denying the grievance. The arbitrator stated that it was clear from the testimony of the union witnesses, which included plaintiffs Hilton and Hightower, that the union employees genuinely believed that the 1983 settlement agreement prohibited the reassignment or hiring of union employees to fill the QC Tech position. The arbitrator noted, however, that there was nothing in the 1983 settlement agreement that would dictate such a result, and the arbitrator found it "curious that the union would propose a construction of the agreement that would cut off the opportunity of bargaining unit employee to advance into company jobs and supervision." (McAnnally Aff., Ex. 1 at p. 7). In addition, the arbitrator opined that the union employees may have overestimated the significance of having "certain formal education in chemistry" due to the excellent qualifications

of the first group of employees assigned to the QC Tech position. (*Id.*). The arbitrator's opinion is supported by the fact that some plaintiffs heard of the "two year" college requirement from plaintiff Hilton, not from the plant manager, Mr. McAnnally, or any other management personnel. (Pickens Depo. at p. 75; Williams Depo. at pp. 17-18). In fact, Stephen Wawrzyniak, defendant's vice president of technical services, testified that he tells the QC coordinator in each plant to look for the following qualifications when filling a QC Tech position: some knowledge in the sciences, a high school education or equivalent, attitude, and integrity. Mr. Wawrzyniak stated that education beyond high school and work experience are desirable, but not required for the QC Tech position.[3] (Wawrzyniak Depo. at pp. 10-11, 21, 27). This was confirmed by the QC coordinator in the Birmingham plant, Howard Nichols, who stated that when filling the QC Tech position, he looked for a combination of previous job experience and education. Specifically, he looked for experience in a related job and someone with a college degree and some college chemistry.[4] (Hilton Depo. at p. 20). Mr. Dees

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3. The plaintiffs contend that Mr. Tessereau, defendant's former president, and Mr. Alsbrooks told them that the new QC Techs would be required to have two years of college and at least a year of chemistry, which Mr. Hightower and Mr. Hudson did not. (Hilton Depo. at p. 11). However, Mr. Tessereau denies that he told anyone that it would be necessary to have two years of college, which included course work in chemistry, in order to work in the lab. (Tessereau Depo. at p. 17) Whether Mr. Tessereau and Mr. Alsbrooks actually made such statements is not material, however, because the 1983 grievance settlement was memorialized in a written document to which the parole evidence rule applies. The document states that "certain formal education in chemistry" is needed for the QC Tech job; it does not say two years of college are required for the job. The plaintiffs may not now alter the terms of the written settlement agreement through parole evidence.

4. On January 7, 1993, Carole Koch, defendant's Director of Quality (Cont'd)

also testified that no one ever told him that two years of college or "certain formal education" was required for the QC Tech position. (Dees Depo. at p. 91).

The arbitrator stated that the exclusion of the QC Techs from the bargaining unit seemed much more suited to the purpose of having an autonomous quality control staff independent from the pressures of the management or the union than to the purpose of prohibiting defendant from filling the QC Tech position with union employees. (McAnnally Aff., Ex. 1 at p. 7).

Ultimately, however, the arbitrator determined that he was without authority to modify the clear and unambiguous provisions of the current Labor Agreement, which took effect January 18, 1993 and will not expire until January 18, 1997, which clearly and unambiguously excluded "laboratory employees" from the bargaining unit. This exclusion necessarily applies to the QC Techs as they are the only laboratory employees in the plant. (*Id.* at pp. 6, 8, 10). Prior to the current labor agreement, the "laboratory employees" had been excluded from the bargaining unit by the express terms of the 1983 grievance settlement agreement. (*Id.*) at p. 8).

(Cont'd)

Control, prepared a job description for the QC Tech position in connection with the passage of the Americans With Disabilities Act. The requirement of "some formal education" was based on Ms. Koch's own years of experience with defendant in the laboratory and the plants, and on the policies and procedures outlined in the Quality Control Manual. Ms. Koch did not specify an educational level requiring some college because she felt that it would unnecessarily limit the field of eligible applicants. Rather, she preferred to place emphasis on practical experience in laboratories. Ms Koch only sent a copy of the job description when Quality Control Coordinators in the plant would request it. (Koch Aff.).

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Following the unfavorable arbitrator's decision, plaintiffs filed the instant action on March 3, 1995. Included in the complaint are claims that were before the arbitrator; namely, that by relaxing the educational standards for the QC Tech position, the defendant eliminated the need for the position to be outside the bargaining unit as contemplated in the 1983 settlement, and that defendant has maintained a double standard by requiring a greater level of qualification from black applicants than white applicants. In essence, therefore, plaintiffs seek to have a second bite by litigating in this action, matters previously decided adversely to them by the arbitrator. In addition to the matters settled in the 1983 grievance settlement and the matters arbitrated in the 1993 grievance, plaintiffs also complain about (1) the manner in which vacancies for the QC Tech position were published, (2) the promotion of two QC Techs to supervisor positions in 1993, and (3) the installation of a shower in the maintenance garage.[5]

With regard to the complaint that the vacancies for the QC Tech position were not posted on the board for the bargaining unit employees, plaintiffs themselves admit that defendant is not required to post the QC Tech vacancies. (O'Neal Depo. at pp. 59-60; Hilton Depo. at p. 100). However, following the grievance over putting Mr. Dees into the QC Tech position, and the comments by the employees that they did not feel like they had fair notice that the QC Tech position was available, Mr. Nichols started posting QC Tech openings in the plant. (Nichols Depo. at p. 65). The court notes that even after defendant starting posting vacancies for the position, none of the plaintiffs submitted a resume to fill the vacancy created when

5. In their complaint, plaintiffs also assert that defendant retaliated against them for past EEOC charges. (Complaint at ¶ 16). However, plaintiffs have provided no evidence of any kind to support this claim.

Mr. Kendricks left the QC Tech position. (O'Neal Depo. at p. 61) (did not turn in resume because defendant knew he had worked there 22 years) (Hilton Depo. at p. 103-04) (said he would not last in the job five minutes and he has a "mistrust" of the position now). In fact, some of the plaintiffs stated that they are no longer interested in the QC Tech position and would not take the position if offered. (Pickens at p. 24). For example, plaintiff Hightower testified that he would not take a supervisor job or QC Tech while this lawsuit was going on because he fears that if he takes a job off the clock (i.e. outside the union) he will be fired. (Hightower Depo. at pp. 11-12).

Turning to plaintiffs' complaint regarding the two supervisor promotions, the court notes that although the majority of plaintiffs' complaint focuses on the QC Tech position, it seems to do so only because the plaintiffs have alleged that the QC Tech job is a prerequisite to being promoted to a supervisor. This view seems to originate from the fact that the two most recently promoted supervisors were both QC Techs prior to their promotion. In 1993, Bill McLeod was promoted from QC Tech to sanitation supervisor and Mark Holloway was promoted from QC Tech to production supervisor. (Clements Aff.). Mr. McAnnally stated that Mr. McLeod and Mr. Holloway's work as a QC Tech made them familiar with the requirements of all operations of defendant's plant, as opposed to plaintiffs who had worked in a single job for many years and only knew the requirements of that job. Therefore, Mr. McAnnally felt that Mr. McLeod and Mr. Holloway would be best qualified for the supervisor positions. (McAnnally Aff.). Further, seniority is not a consideration for filling supervisor vacancies. (*Id.*).

In their depositions, most of the plaintiffs expressed a desire

to become a supervisor with defendant. They allege that the QC Tech position is a prerequisite to becoming a supervisor, therefore, their exclusion from the QC Tech position has made it impossible for them to be promoted to supervisor. However, the undisputed evidence shows that while some of the other supervisors were hired from outside the plant, several of the supervisors were hired from the bargaining unit in the plant, and plaintiffs knew this fact. (Clements Aff.; Browning Depo. at pp. 24-25). For example, Rod Breedlove, who is black, was promoted to supervisor in the Birmingham plant out of the bargaining unit long before this action was filed, and he is still employed in that capacity. (Clements Aff.; Clements Depo. at pp. 41-42). Johnny Banks, who is also black, was promoted to supervisor out of the bargaining unit. He retired and was replaced by Mr. Holloway. (Pickens Depo. at pp. 69-70).

Moreover, none of the plaintiffs has ever applied for or indicated an interest in a supervisory job until Mr. Dees was placed in the QC Tech job. (McAnnally Aff.). In fact, many of the plaintiffs do not seem to complain about giving the supervisor jobs to Mr. Holloway and Mr. McLeod. (O'Neal Depo. at pp. 57-58). Rather, their main complaint seems to be that they were not even considered for the positions. (Browning Depo. at pp. 25-26; Pickens Depo. at pp. 17-18, 70-72).

Finally, plaintiffs also complain that they have been discriminatorily denied the use of a shower installed in the maintenance garage. The shower was installed in the maintenance department while Mr. McAnnally was on vacation in July of 1993 in an old garage that was used to store spare parts and a mower. The garage was kept locked because of the equipment. The shower was constructed at minimal expense using the sewer drain and water supply at a toilet nearby. Mr. McAnnally found

out about the shower when he returned from his vacation. There were two blacks in the department at that time, Noah Caves and James Cunningham (retired in 1995). (McAnnally Aff.). Mr. Caves asked Mr. McAnnally if the maintenance department should rip out the shower since it had not been authorized, but Mr. McAnnally told him to leave it there. However, Mr. McAnnally did not post any notices about the shower at the plant because he believed the existence of the shower was common knowledge. (McAnnally Aff.).

Plaintiffs assert that for years, through the union, they had requested that a shower be built, but defendant told the union that a shower would never be built on the premises. However, defendant states that the Union has not presented a demand that defendant build a shower for the employees at any time, at least since 1984. (Clements Aff.).

Plaintiffs state that they were excluded from the shower. (Pickens Depo. at p. 28; O'Neal Depo. at p. 17). However, they admit that no one told them they could not take a shower, they never asked to take a shower, and they never asked anyone for the key to the shower. (Pickens Depo. at pp. 30-34; Williams Depo. at p. 66; Hilton Depo. at pp. 57, 60; O'Neal Depo. at p. 21; Hightower Depo. at pp. 37, 40). Plaintiffs say that they did not ask for a key because they were not going to "beg" anyone to take a shower. (*Id.*).

Further, the topic of showers was not brought up in any union negotiation or grievance that Mr. McAnnally attended, and the shower was not mentioned in any EEOC charge. (McAnnally Aff.; Browning Depo. at pp. 18-19; Hightower Depo. at pp. 40-41; Pickens Depo. at p. 31: Williams Depo. at p. 67). Plaintiffs did not even complain about the shower to

any supervisory employee. (Pickens Depo. at p. 31; Hightower Depo. at p. 40).

Plaintiffs state that they have been damaged by defendant's actions as follows. Plaintiff Hilton testified that he has been damaged by defendant's actions because his pride was hurt when Mr. Dees, a table man, was "catapulted" to a lab position, and that he lost prestige in the company. (Hilton Depo. at pp. 116-17). Plaintiff Hilton testified that he was qualified to perform any job in the plant and had he been asked to take the QC Tech position filled by Mr. Dees, he would have seriously considered taking it. (Hilton Depo. at p. 9-10). He further stated that all the plaintiffs wanted was to put the QC Tech job back into the bargaining unit so that the union employees could competitively bid for the position. (Hilton Depo. at p. 121).

Plaintiff O'Neal also stated that he was "hurt" and "humiliated" and treated like he did not "know nothing" because he was not given the opportunity to become a supervisor or a QC Tech. (O'Neal Depo. at pp. 14-15).

Plaintiff Pickens stated that he was damaged when the QC Tech position was filled by Mr. Dees because he was more qualified than Mr. Dees and had more time with the defendant. (Pickens Depo. at p. 11).

Summary Judgment Standard:

Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See*

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. *See Fitzpatrick*, 2 F.3d at 1115-17 (citing *United States v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (*en banc*)).

If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by

coming forward with positive evidence demonstrating the absence of a genuine issue of material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. *Fitzpatrick*, 2 F.3d at 1115. If the moving party makes such a showing, the burden shifts to the non-moving party to produce significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. If the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial. The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to *affirmatively* show the absence of evidence in the record to support a judgment for the non-moving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require evidence negating the non-movant's claim; it simply requires the movant to point out to the district court that there is an absence of evidence to support the non-moving party's case. *Fitzpatrick*, 2 F.3d at 1115-16. The affirmative showing may be accomplished by reference to any combination of the following: pleadings; deposition testimony of a party or its witness; affidavits; responses to interrogatories or failure to respond to interrogatories; requests for admission and responses thereto; and other exchanges between the parties that are in the record. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991); *see also Celotex*, 477 U.S. at 332 (Brennan, J., dissenting). If the movant meets

its initial burden by using this second method, the non-moving party may either point out to the court record evidence, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.

Title VII:

In order to prevail on a discriminatory treatment claim under Title VII, a plaintiff must prove by a preponderance of the evidence "intentional discrimination" on the part of his employer. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). To prove intentional discrimination, a plaintiff must demonstrate more than "the mere occurrence of isolated or accidental or sporadic discriminatory acts." *Anderson v. Douglas & Lohason Co., Inc.*, 26 F.3d 1277, 1285 (5th Cir. 1994) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (other citation omitted). In other words, the plaintiff must establish "by a preponderance of the evidence that racial discrimination was the [employer's] standard operating procedure — the regular rather than the unusual practice. *Id.*

The analytical framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), is properly used when the plaintiff attempts to prove his claim through circumstantial evidence. *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984).[6]

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6. A *prima facie* case of discrimination may also be established by (Cont'd)

(Cont'd)
direct evidence of discriminatory intent or by statistics if they are sufficiently compelling. *See Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 618 (11th Cir. 1983).

Presumably as direct evidence of discrimination, plaintiffs state that during a meeting relating to the 1993 grievance, Mr. Clements stated that defendant "may be discriminating against y'all a little bit, and we will correct it." (Hilton Depo. at pp. 119-20, 122). Direct evidence has been defined as "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race]." *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989). The Supreme Court has stated that as a matter of law, alleged statements made by decision-makers which are not related to the decision at issue do not constitute direct evidence. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989). Plaintiffs have failed to show the requisite nexus between the statement alleged and the challenged decisions. In addition, the decision regarding filling the QC Tech position was made by Mr. Nichols and Mr. Wawarzyniak, not Mr. Clements. Thus, the court finds that this statement does not rise to the level of direct evidence of discrimination.

In addition, plaintiffs have presented numbers related the racial composition of defendant's plant historically and at present. However, these numbers fall short of the kind of information needed to present a case of discrimination through statistics. In addition, the undisputed evidence shows that since 1983 until the time Mr. Dees was placed in the QC Tech position, of the ten QC Techs hired, six were black and four were white. (McAnnally Aff.). All of the three QC Techs hired since Mr. Dees have been black. (*Id.*). Although, the two most recent supervisors hired, Mr. McLeod and Mr. Holloway, were white, one of them was hired to replace Johnny Banks who was black. Moreover, Ron Breedlove, who was made supervisor prior to Mr. McLeod and Mr. Holloway, is black and remains a supervisor to this day. This type of evidence falls short of the type of evidence needed to prove a statistical case of discrimination. *See Webb v. Derwinkski*, 868 F.Supp. 1184, 1189-90 (E.D. Mo. 1994) ("[T]he Court finds that plaintiff's statistical evidence is not probative of disparate treatment on the basis of race. Plaintiff's statistics show that defendant hired a relatively small number of blacks for

(Cont'd)

Appendix C

Under the *McDonnell Douglas* framework, a plaintiff has the initial burden of proving a *prima facie* case of discrimination. If the plaintiff meets this burden, the defendant must articulate some legitimate, nondiscriminatory reason for the employment decision. If the defendant meets this burden of production, the presumption of discrimination created by the *prima facie* case "drops out of the picture," and the plaintiff has the ultimate burden of proving that she has been the victim of intentional discrimination. *St. Mary's Honor Ctr. v. Hicks*, __ U.S. __, 113 S.Ct. 2742, 2746-49 (1993). In *Hicks*, the Supreme Court made clear that the fact-finder's disbelief of the reasons the defendant offers does not compel judgment for the plaintiff. *Id.* at 2749. Rather, once the defendant has met its burden of production, the *McDonnell Douglas* framework becomes irrelevant; the sole inquiry is whether the plaintiff successfully carries the burden of persuading the trier of fact that the defendant engaged in intentional discrimination on the basis of a prohibited factor. That is not to say that the fact-finder's rejection of the defendant's proffered reason is of no probative value. The fact-finder's disbelief may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.

Generally, a plaintiff establishes a *prima facie* case of disparate treatment discrimination by proving a set of facts which would enable the fact-finder to conclude, without more, that it

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accounting-related or fiscal jobs. This has little probative value, however, because its underlying statistic (the black general population) includes those who are not qualified for the positions. The more relevant data would show the number of qualified blacks hired for these jobs. The statistics plaintiff provides, standing alone, are insufficient to support a claim of discrimination.") (citing *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 733 (8th Cir. 1982)).

is more likely than not that the adverse employment action was the product of discrimination.[7] The elements of a promotion

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7. The court will use the disparate treatment model of discrimination rather than the disparate impact model. To establish a prima facie case of disparate impact, a plaintiff must demonstrate that a specific employment practice or policy has a significant discriminatory impact on a protected group. As a general rule, such a showing is made by the use of statistics. *Webb*, 868 F. Supp. 1190 (age discrimination claim). Thereafter, the burden shifts to the employer to justify the practice as being "related to job performance." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1981).

Although plaintiffs allege that defendant's educational requirements for the QC Tech job have prevented them from attaining the QC Tech position, the undisputed evidence shows that the educational requirements have not had a disparate impact on black applicants for the QC Tech position. As noted previously, of the fourteen QC Techs hired since the position was created in 1983, nine have been black and five have been white. (McAnnally Aff.). Moreover, defendant has presented a business-related reason for the educational requirement; that such an educational background aids in the performance of the duties of the QC Tech position. Specifically, the QC Techs were responsible for the operation and calibration of technical equipment and were also responsible for various chemical testing on the pet food product.

Generally to succeed under this theory, the plaintiff must establish a "meaningful statistical comparison" between those employees eligible for promotion and those actually promoted. Therefore, the starting part for this analysis is a comparison of an appropriate candidate pool and its racial makeup. *See Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1982). The test is not whether a racially neutral employment practice adversely affects a single employee, but whether it adversely affects blacks at a substantially higher rate than whites. *See Griggs*, 401 U.S. at 431. In this case, the positions of QC Tech and supervisor is one from which defendant drew applicants from both within and outside the plant, thus reflecting a broad range of potential qualified employees. Although plaintiffs

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claim under Title VII are (1) that the plaintiff is a member of a protected class, (2) that the plaintiff applied for and was

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have placed into the record facts showing the approximate racial composition of defendant's plant in Birmingham, not all employees in the plant are qualified for the positions at issue, and plaintiffs have not placed in the record any facts with respect to the racial composition of the potential pool, including qualified employees from within and outside the plant, from which applicants are actually drawn. Because of these deficiencies, the court is unable to make the proper comparison between the racial composition of the jobs at issue and the racial composition of the qualified population in the relevant labor pool.

Plaintiffs numbers with respect to the supervisor position are equally infirm. Without evidence of the pool of qualified applicants, which includes those within and outside the plant, the court cannot determine whether the selection of blacks to this position is disproportionately small to the pool, disproportionately large, or approximately statistically perfect. *Whiteacre v. Davey*, 890 F.2d 1168, 1172 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). Plaintiffs have therefore failed to establish a prima facie case of disparate impact with respect to the supervisor position because statistics based on an improper labor pool "have no probative value." *Cox v. City of Chicago*, 868 F.2d 217, 221 (7th Cir. 1989).

In addition, of the evidence presented, the court has not found probative statistical evidence, or any other evidence, that the requirements affect qualified black employees more harshly than qualified white employees. To the contrary, the undisputed evidence reflects a disproportionate number of black employees in the position of QC Tech, and several black employees in the position of supervisor. *See Thompson v. Mississippi State Personnel Bd.*, 674 F.Supp. 198, 207 (N.D. Miss. 1987) "[T]he high percentage of female applicants for the position indicates that the educational requirement did not discourage otherwise qualified individuals from applying." "If the plaintiff fails to prove the causal connection between the educational requirement and actual disparities in employment opportunities within the defendant's work force, then the court must find that there is no disparate impact on the protected class." *Id.* at 209.

qualified for a job for which the employer was seeking applicants, (3) that the plaintiff was rejected despite his or her qualifications, and (4) that after the rejection, the position remained open and the employer continued to seek applicants. *McDonnell Douglas*, 411 U.S. at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981).

The specific promotions at issue in this case are (1) the promotion of Kenney Dees to QC Tech in 1993;[8] (2) the promotion of Mark Holloway to production supervisor in 1993; and (3) the promotion of Bill McLeod to sanitation supervisor in 1993. All three of these men are white.

Assuming for purposes of this motion only that the plaintiffs were qualified for the three positions at issue, plaintiffs have shown the first, third, and fourth elements of a *prima facie* case. However, none of the plaintiffs applied for the supervisor positions and only two plaintiffs, plaintiff Pickens and plaintiff Browning, submitted a resume for the QC Tech position filled by Mr. Dees. (Nichols Aff.; Williams Depo. at p. 21) Plaintiff Pickens stated that he submitted a resume for the QC Tech position that was filled by Mr. Kendrick. However, plaintiff Pickens does not contend that the hiring of Kendricks was wrong. (Pickens Depo. at p. 77-78). However, even plaintiff Pickens testified that he is no longer interested in the QC Tech position. (Pickens Depo. at p. 78). Plaintiff Browning also submitted a resume for the QC Tech position filled by Mr.

8. It is telling that plaintiffs complain of only one out of eleven promotions to the QC Tech position, the promotion of Kenny Dees. In other words, plaintiffs do not assert that defendant's choice for the other ten QC Tech vacancies was in any way discriminatory. And indeed, it would be difficult for plaintiffs to do so as six of those vacancies were filled with black applicants, two of which were recruited to the position by plaintiff Williams.

Kendrick. However, he too does not contend that the selection of Mr. Kendrick was discriminatory. (Browning Depo. at pp. 28-29). Mr. Browning was offered a QC Tech vacancy on the second shift but declined because he wanted to work on the first shift. (Browning Depo. at pp. 30-31). In addition, Mr. Browning testified that he did not presently wish to be considered for the QC Tech position, even on the first shift. (Browning Depo. at p. 39).

Plaintiff Hightower brought the resumes of James Perdue and Arthur Kendrick to Mr. Nichols to help these two individuals apply for a QC Tech position. These two individuals were eventually hired by defendant as QC Techs. However, plaintiff Hightower never submitted his own resume for consideration for the QC Tech position. Plaintiff Hightower stated that he did not submit his own resume because Mr. Nichols told him that defendant's standards required two years of college and chemistry. (Hightower Depo. at pp. 56-57, 61). Plaintiff Hightower stated he did not submit his resume after Dees was hired because he still thought college and chemistry were required for the job, even though the notice posted on the company bulletin board after Dees selection said any interested person could submit a resume. (Hightower Depo. at p. 61).

The Eleventh Circuit has held that when a defendant does not advertise job openings, the plaintiff does not have to "apply" for a position in order to establish a *prima facie* case. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132-33 (11th Cir. 1984).

> By showing that he applied, the plaintiff shows that the employer knew he was interested in the job. But when there is no

> formal notice of the job's availability, the plaintiff may have no means, within his own knowledge, of showing whether the employer considered him or not. Furthermore, when an employer uses such informal methods it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest. Accordingly, a plaintiff makes out a prima facie case — that is, he creates a presumption of discrimination and forces the employer to articulate legitimate reasons for his rejection — as long as he establishes that the company had some reason or duty to consider him for the post.

Id. at 1133.

However, if a plaintiff was not qualified for the job at issue or would not have accepted the job if offered, the plaintiff could not make out a *prima facie* case. *Id.* at 1132-33. In *Carmichael*, the defendant relied on word of mouth and informal review procedures in determining who would be offered a promotion. The plaintiff in that case had indicated as best he could that he would take any available job. In addition, the evidence showed that few blacks had worked for the defendant, and those that did were usually limited to sanitation and repair jobs, thus showing a consistently enforced discriminatory policy. *Id.*

In the instant case, by contrast, the QC Coordinator, Mr. Nichols, testified that he always considered the bargaining unit employees when making a decision about filling a QC Tech

position because defendant would always like to promote from within first. (Nichols Depo. at pp. 22, 32, 40). In addition, unlike the situation in *Carmichael*, defendant posted openings for the QC Tech position in newspaper advertisements. (Nichols Depo. at pp. 22-23). Moreover, the undisputed evidence in the instant case, unlike that in *Carmichael*, shows that the majority of QC Techs hired were black and blacks were consistently represented among the QC Techs. The importance of this fact was demonstrated by the Supreme Court in *International Bhd of Teamsters v. United States*, 431 U.S. 324, 365 (1977) (Plaintiff did not show that he applied for a promotion or that applying for the position would have been futile because defendant would have denied him the promotion in accordance with a consistently enforced discriminatory policy). The Court held that in order to meet the second element of a prima facie case of failure to promote, the non-applicant must show that he was a potential victim of unlawful discrimination and that he was deterred from applying for the job by employer's discriminatory practices. *Id.* at 367-68. In the instant case, plaintiffs have failed to show that defendant had a pattern or practice of discrimination in filling the QC Tech position or that an application from a minority would have been "a vain and useless act." *Id.* On the contrary, as noted above, blacks were consistently promoted to both the QC Tech position and the supervisor positions. In fact, plaintiff Hilton brought in two resumes for black applicants who were chosen for two of the QC Tech positions. Thus, all plaintiffs, except plaintiff Pickens and plaintiff Browning, have failed to present a *prima facie* case of discrimination.

Even if plaintiffs did present a *prima facie* case of discrimination, and as to plaintiffs Pickens and Browning, defendant has proffered legitimate, race-neutral reasons for the

promoting Mr. Dees to the QC Tech position. Defendant hired Mr. Dees for the vacant QC Tech position in 1993 because he had three years of experience with another pet food company working in a lab with similar equipment, one of which was a Technicon infrared analyzer like defendant used, he performed similar tests, calibrated the equipment, and logged test results and other information, and he had taken high school chemistry. (Dees Depo. at pp. 10-15, 27, 41-43, 59-60, 83). In addition, Mr. Dees expressed an interest in working in defendant's lab. (Dees Depo. at pp. 59-60, 69-70; McAnnally Depo. at p. 56; Nichols Depo. at pp. 56-57). The fact that plaintiffs feel that defendant misjudged Mr. Dees capabilities in comparison to their own does not in and of itself expose defendant to Title VII liability. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

As noted, given plaintiffs' present disdain for the QC Tech position, the court notes that the plaintiffs' complaint regarding the QC Tech job seems to stem more from plaintiffs' mistaken assumption that all future supervisors would be chosen from the lab as Mr. Holloway and Mr. McLeod were, rather than their sincere desire to hold the QC Tech job. (Hightower Depo. at pp. 54-55; Hilton Depo. at p. 51). However, plaintiffs admit that their belief that all future supervisors would come from the lab did not come from management, but rather from the union representative, plaintiff Hilton. (Hightower Depo. at p. 55). As noted by the arbitrator, such a statement by the union representative is curious and unfortunate as it would needlessly limit the opportunity of bargaining unit employees to advance into supervisor positions.

As with the QC Tech positions, defendant also considered the bargaining unit employees when making a decision about

filling a supervisor position because defendant liked to promote from within. (McAnnally Depo. at p. 25). None of the plaintiffs submitted a resume for the two vacant supervisor positions even though it is quite obvious from their depositions that they were all interested in becoming a supervisor. Most of the plaintiffs expressed that they wanted defendant to come and ask them to be a supervisor. As with the QC Tech position, there is no evidence that any of the plaintiffs was the potential victim of unlawful discrimination or that submitting a resume for the job would have been a "vain and useless act" due to discriminatory practices as defendant had previously promoted Johnny Banks and Rod Breedlove, two black union employees, to supervisor positions.

As noted, although the Eleventh Circuit has held that the failure to apply for a position is not essential to a *prima facie* case, the plaintiff must present some evidence that the company had some reason or duty to consider him for the post without an application. *Carmichael*, 738 F.2d at 1133. Plaintiff Hilton stated that it was common knowledge around the plant that the supervisor positions were going to be available because of the retirement of the former supervisors. However, plaintiff Hilton stated that he did not express an interest in the positions because he assumed that defendant was going to hire the supervisors from outside the plant. (Hilton Depo. at p. 83, 108). Further, plaintiff Hilton said in Mr. McAnnally's presence during a grievance meeting that he would not take a supervisor job. At the time of the grievance related to Mr. Dees' promotion, Mr. Clements stated that plaintiff Hilton was not considered for the supervisory positions because Mr. Clements thought he was anticompany. (McAnnally Aff.; Hilton Depo. at p. 88). Plaintiff Hilton concedes that the reason given by Mr. Clements for not considering him for the supervisor positions does not have

anything to do with race. (Hilton Depo. at p. 91). Plaintiff Hilton further testified that he no longer wants a supervisor job because he would not last in the position. (Hilton Depo. at p. 108).

Plaintiff O'Neal testified that even though he knew two supervisors were retiring in 1993, he did not seek either job or talk to someone in management about the jobs because he felt like he could not get them. (O'Neal Depo. at pp. 54-56). In fact, plaintiff O'Neal stated that he wanted the defendant to ask him to take one of the supervisor's positions. (*Id.* at p. 57). Plaintiff O'Neal also stated that he "gave it up" because "from 1983 I felt it wasn't no way that I can get in the lab or supervision." (O'Neal Depo. at p. 27).

Mr. McAnnally testified that he considered all of defendant's employees when making the decision who to promote to supervisor. In addition, the plaintiffs have testified that even though it was common knowledge that there would be two supervisor vacancies, they did not apply for the positions. There is obviously some confusion and misunderstanding by plaintiffs about how to become a supervisor. While such confusion and misunderstanding is unfortunate, it does not amount to discrimination. *Hazen Paper Co. v. Biggins*, __ U.S. __, 113 S.Ct. 1701, 1706 (1993) ("Liability depends on whether the protected trait actually motivated the employer's decision."). As shown above, it would not have been "vain and useless" for plaintiffs to submit a resume for these positions because defendant had previously promoted two black union employees to supervisor positions, and plaintiffs, as long-standing employees of defendant, were aware of this fact. Under these circumstances, the court finds that defendant did not have a reason or duty to consider plaintiffs for the post, and plaintiffs failure to submit a resume for the positions when they were aware of the vacancies is fatal to their *prima facie* case.

However, even if plaintiffs had presented a *prima facie* case, defendant has offered legitimate, race-neutral reasons for the decision to promote Mr. McLeod and Mr. Holloway to supervisor positions. Defendant promoted Mr. McLeod and Mr. Holloway for the vacant supervisor positions in 1993 because it felt that they were the most qualified individuals for the jobs. (McAnnally Aff.) Both men's quality control work required them to be familiar with each stage of defendant's operation, and to make suggested corrections to all production workers for quality control purposes, thus, both men were familiar with the current requirements of all operations. (*Id.*) In addition, both men had expressed interest in becoming supervisors and had performed well as QC Techs. (McAnnally Aff.). *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984) (No matter how harsh or unfair the plaintiffs think the requirements are, an employer has an absolute and legal right to act for a "good reason, a bad reason . . . or for no reason at all, as long as its action is not for a discriminatory reason.").

At this point, the *McDonnell Douglas* framework becomes irrelevant, and the sole inquiry is whether the plaintiffs have presented substantial evidence that they were the victims of intentional discrimination. *St. Mary's Honor Center*, 113 S.Ct. at 2746-49. Since the defendant articulated legitimate, non-discriminatory reasons for plaintiffs' non-selection for the three positions at issue, the burden shifts back to the plaintiffs to raise a genuine factual question as to whether defendant's stated reasons for the promotion decisions are mere pretext. *See Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 920 (11th Cir. 1993). The plaintiff must present "concrete evidence in the form of specific facts which show that the defendant's proffered reasons are pretext. Mere conclusory allegations and

assertions will not suffice." *Early v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

As evidence of pretext, plaintiffs state that Mr. McAnnally had a habit of hiring people that had previously worked with him when he was the plant manager for Pet Specialties. (Plaintiffs' Brief at p. 9). While it is true that Dees worked with McAnnally at Pet Specialties, promoting Dees to the QC Tech position because of this fact does not show intentional discrimination based on race. *See Odom v. Frank*, 3 F.3d 839, 849-50 (5th Cir. 1993) (perpetuation of "good old boy" network does not amount to racial discrimination). Plaintiffs also assert that while Mr. Dees did have experience in a pet food manufacturing lab, his experience was two years prior to his QC Tech work, and he had to be trained to perform some of the tests that a QC Tech for defendant performed. (Plaintiff's Brief at p. 15). Plaintiffs assert that they had worked in the plant much longer than Mr. Dees and they could have been trained to perform these tests as easily as Mr. Dees. However, the law is clear that absent a discriminatory animus, the employer is free to choose the candidate it feels is best suited for the job. Defendant stated that it determined that Mr. Dees was best suited for the vacant QC Tech position in large part because of his past experience performing similar tests using similar equipment. The court will not second guess defendant's legitimate business decisions where there is no evidence that the decision was made due to discriminatory animus.[9] *Carter v. South Cent. Bell*, 912 F.2d 832, 842 (5th Cir. 1990) ("[Plaintiff] argues that in several

9. Plaintiffs' evidence regarding derogatory statements made by Mr. Dees about some of the plaintiffs does not amount to evidence of pretext. The evidence shows that Mr. Dees was in no way involved in the promotional decisions, and there is no evidence that the decision makers made any derogatory statements about the plaintiffs based on race or otherwise.

of these areas his skills were superior to those of [the white applicant], but he did not demonstrate a conspicuous edge in any area except length of service with [defendant]. Apparently, this had never been one of the criteria for a Planning job."); *Benjamin v. Aluminum Co. of America*, 921 F.2d 170, 172 (8th Cir. 1990) (finding that plaintiff was not victim of discriminatory denial of promotion was supported by evidence that individual who was given promotion had more relevant work experience, even though she had less seniority than plaintiff).

The thrust of plaintiffs' arguments regarding pretext are related to the QC Tech position. However, as to the supervisor positions, the court notes that plaintiffs do not assert that they were more qualified than Mr. Holloway or Mr. McLeod or that Mr. Holloway and Mr. McLeod were not qualified for the supervisor positions. (O'Neal Depo. at pp. 57-58; Pickens Depo. at p. 57). In addition, plaintiffs have not presented any concrete evidence that defendant's reasons for promoting Mr. McLeod and Mr. Holloway are pretext for discrimination. *Clark v. Huntsville Bd. Of Educ.*, 717 F.2d 525 (11th Cir. 1983) (courts may not second guess managerial decisions made in apparent good faith).

Plaintiffs have made bare allegations about the racial composition of defendant's workforce in support of their allegations of discrimination. However, the mere percentages of the racial composition of defendant's workforce, without more, likewise do not amount to specific facts demonstrating that defendant's proffered reasons for the promotion decisions are pretext for discrimination.

Plaintiffs also argue that the construction of the shower is

"strong evidence that [defendant] made it a practice to treat blacks differently." (Plaintiff's brief at p. 46). However, the plaintiffs' own testimony shows that they never asked to take a shower, and that they did not ever ask for a key to the shower because they were not going to "beg" anyone to use the shower. (Pickens Depo. at pp. 30-34; Williams Depo. at p. 66; Hilton Depo. at pp. 57, 60; O'Neal Depo. at p. 21; Hightower Depo. at pp. 37, 40). Plaintiffs also admitted that they never complained about the shower to any supervisory employee. (Pickens Depo. at p. 31; Hightower Depo. at p. 40). Thus, plaintiffs have failed to show that they were denied use of the shower, or that they were treated any differently than white employees who wanted to take a shower.

Summary judgment in favor of the defendant-employer is appropriate when the plaintiff fails to provide a sufficient factual basis in the record upon which a reasonable trier of fact could find that the stated reasons for the adverse employment actions are pretext. *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1391 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983) (holding that "a plaintiff . . . cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather must come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact."). Plaintiffs have failed to show that the promotional decisions at issue, i.e., the promotion of Mr. Dees, Mr. McLeod, and Mr. Holloway, were the result of discriminatory animus rather than legitimate business decisions. Thus, summary judgment is due to be granted in defendant's favor. A separate order in accordance with this memorandum of decision will be entered.

Appendix C

DONE this 5th day of April, 1996.

s/ illegible
UNITED STATES DISTRICT JUDGE

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 9, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6399

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, GEORGE PICKENS, JR.,

Plaintiffs-Appellants,

versus

DOANE PRODUCTS COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: COX, Circuit Judge, KRAVITCH*, Senior Circuit Judge, STAGG**, Senior District Judge.

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* Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997.

** Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

Appendix D

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

APPENDIX E — AMENDED AFFIDAVIT OF JAMES CUNNINGHAM DATED FEBRUARY 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV 95-H0525-S

CHARLES EDWARD HIGHTOWER, et al.,

Plaintiffs,

v.

DOANE PRODUCTS COMPANY,

Defendants.

AMENDED AFFIDAVIT OF JAMES CUNNINGHAM

State of Alabama)
)
County of Jefferson)

Before me, the undersigned authority, personally appeared JAMES CUNNINGHAM, who is known to me, and who, after being by me first duly sworn, does depose and say as follows:

My name is JAMES CUNNINGHAM; I am over the age of nineteen years, I am a resident of Jefferson County, Alabama, and I am competent to testify as follows:

I began employment with Doane Products Company, formerly Cosby Hodges, in May of 1954. I retired in February of 1995. During this time I was a member of the local workers union. On or about March 1, 1994, a hearing took place concerning a grievance of race discrimination filed on November

Appendix E

29, 1993. Present at that meeting were numerous people including myself, union president Harold Hilton and Earl Clements. During the course of the meeting or near its conclusion, a union member asked a question of Mr. Clements regarding discrimination against the black employees. Mr. Clements reply was that they (the company) might have "discriminated a little bit but we can correct that." Other union members at the meeting also heard this comment.

I was also present at a grievance meeting back in 1983 that occurred around the time Doane bought Cosby Hodges. The topic of this meeting was Doane's removing the lab tech job from the bargaining unit and moving Charles Hightower and another union employee out of the lab. I recall Mr. Alsbrooks and Herb Tessereau being at this meeting. We, the union members, were told that Doane had lab requirements at their main plant in Joplin, Missouri, and that they wanted the same type of operation at the Birmingham plant. We were told that the minimum requirements to work in the lab, now that Doane operated it, was two years of college which included some chemistry or biology. Herb Tessereau told us this about the educational requirements.

Dated this the 19th of February, 1996.

s/ James Cunningham
James Cunningham

SWORN TO AND SUBSCRIBED BEFORE ME ON THIS THE 19th OF FEBRUARY, 1996.

s/ Ryan Kirby
Notary Public
My commission expires: 9/8/99

APPENDIX F — EXCERPTS OF DEPOSITION OF EARL CLEMENTS DATED AUGUST 24, 1995

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NUMBER: 95-H-0525-S

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING AND GEORGE PICKENS, JR.,

Plaintiffs,

vs.

DOANE PRODUCTS COMPANY,

Defendant.

DEPOSITION OF: EARL CLEMENTS

The deposition of Earl Clements was taken before Deborah H. Mayo, CSR, RPR, Registered Professional Reporter, commencing at 4:20 P.M. on the 24th day of August, 1995, by the Plaintiffs, at the law offices of Burr & Forman, 3100 SouthTrust Tower, 420 North 20th Street, Birmingham, Alabama, pursuant to the stipulations set forth herein.

* * *

[21] program and brought him into supervisory.

But, you know, up until this issue, I had never heard

anyone say that, you know, we can't go into the QC department, we're not allowed to, or anything.

Q. Was it curious to you that none of the bargaining unit employees were applying for the QC tech jobs when they came open?

A. Not really, because I just always had the feeling that people were satisfied where they was at, didn't want to become a part of management. I think there was a lot of — I call it difference in attitudes that you could see out here. There was a lot of friction between the management and employees. I mean, you could see it from the time — the very first trip down here. So that was — I just always had a feeling that that's why no one was asking to go into these positions. They wasn't interested.

Q. The first you heard about the Kenny Dees [22] problem was what?

A. Was when Bobby called me in Joplin and said, "Earl, we're — you know, we were all set to — they were going to move Kenny Dees into QC and Harold said that we can't do that and — based on an agreement." So I said, "Well, not that I'm aware of." But I said, "Let me go through all my old files." And that's when I dug out the old agreement and, you know, read it and I said, "Bobby, I just — the way I read this agreement is you can — you know, that they took the QC or lab techs out of the bargaining unit, but not that we can't hire anyone out of the bargaining unit into the position."

So — but that's why, as you've referred to today in a couple of conversations, you know, the delay then with Kenny Dees in putting him into the job was we was — we were going to try

to get it, I guess, addressed and handled and tone down the friction over that position, [23] but it didn't work.

Q. What did you do in an attempt — what was your first advice to the people down here as to how to handle the situation?

A. I told Bobby, let's not — let's not move on it right now. Let me, you know, read this thing over. Let me discuss it with, you know, with Bob, my boss, Robinson who is president. And I said, you know, see if he knows of any different — or anything that has ever been said otherwise.

But I said, "Based on what I'm reading on this agreement, that's not the case." I discussed it with Bob and, you know, he felt the same way. And then I called Radford Tidwell and said, "Radford, I guess we've got a problem out here at the plant." And he said, "Yeah, I've already heard about it."

And I said — well, I said, "I don't understand why the concern," you know. And I said the same thing to [24] Radford that I'm saying today. Most companies want to give people the opportunity to promote from within. That's why I'm where I'm at today. Why anybody would sit there and want to fight that situation and say no, you can't move this guy from the plant into the department doesn't — you know, just didn't seem logical to me.

Q. Then what was the next step that you took?

A. Then, you know, we reviewed it and Bobby and them, I think, had a grievance meeting over it and tried to address it regarding, guys, you know, that this agreement isn't saying that we can't move people out of the plant, but it didn't resolve

it. And then that's when I told Bobby go ahead and put Kenny in the position, and we'll just have to go to the next step, which was the next — the third-step grievance meeting, and then I came down for it.

Q. That was your first trip down here based on the Dees' promotion?

* * *

Supreme Court, U.S.
FILED
AUG 8 1997
CLERK

No. 97-116

In The

Supreme Court of the United States

October Term, 1996

CHARLES EDWARD HIGHTOWER, CURTIS WILLIAMS, HAROLD D. HILTON, WALTER J. O'NEAL, EDWARD BROWNING, and GEORGE PICKENS, JR.,

Petitioners,

vs.

DOANE PRODUCTS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Petitioners' designation of Question Presented No. 1 is argumentative and does not comply with Supreme Court Rule 21.1.(a). A more accurate formulation would be, whether there was any substantial evidence of any admission by a decision-maker of the respondent, that a promotion decision was based on race, so as to raise a genuine issue of material fact.

2. Is an employer entitled to summary judgment in a Title VII discrimination case if in the final analysis no reasonable jury could find for the employees upon the evidence upon which the case was submitted under Fed.R.Civ.P. 56?

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STATEMENT OF JURISDICTION

The Petitioners' Statement of Jurisdiction does not conform to Supreme Court Rule 21.1 (e)(i) and (ii). The date of the judgment sought to be reviewed is January 29, 1997 (Pet. App. 1a) and the date of the order denying petition for rehearing and suggestion for rehearing *en banc* was April 9, 1997 (*Id.*, p. 41a), not April 5, 1997 as stated on page 1 of the Petition. Respondent did not receive the Petition until July 14, 1997, and it was not accompanied by any form of certificate, affidavit, or other proof of service, nor has the Respondent since received any notice of service, filing, or written notice of docketing. As the last day for filing the Petition according to 28 U.S.C. § 2101(c) was July 8, 1997, Respondent has no way of knowing whether the Petition was timely filed under Supreme Court Rule 28.2. It was advised over the telephone by the Supreme Court Clerk's office that the Petition was docketed on July 18, 1997 as No. 97-116. Respondent has no further information as to filing or docketing.

RESPONSE TO THE STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate. To begin with, the Eleventh Circuit did not "adopt" the District Court's decision as petitioners allege. (Pet. 10.) Rather, it merely held, under 11th Circuit Rule 36-1(d), that the summary judgment granted in favor of respondent was supported by the record. (Pet. App. 29a, n.1.) That result could be based on any reasoning supported

by the record; it does not constitute an adoption of the district court's opinion.

Furthermore, Petitioners' recitation of the facts is incomplete and misleading. The centerpiece of Petitioners' argument is a statement alleged to have been made by Earl Clements, Respondent's Vice President of Production, at a grievance meeting in March of 1994. Petitioners state that "during the course of the meeting, a union member asked a question of Clements regarding Doane's discriminating against the black employees by holding them to higher educational requirements. Clements' reply was that they (the company) might have 'discriminated a little bit but we can correct that.' " (Pet. 5, citations omitted.) However, the amended affidavit of James Cunningham (Pet. App. 43a), which is the evidentiary source of Clements' alleged statement, merely states that Clements made the statement during the course of a grievance proceeding; it says nothing about anyone's being held to higher education requirements, and does not otherwise tie the alleged statement to the decision to promote Kenny Dees to QC Technician. Furthermore, the Petition repeatedly states, without citation, that Clements was "directly involved" in the decision to promote Dees. That is simply incorrect, and it is not in any way supported by the record. As reflected in the district court's Memorandum Decision (Pet. App. 25a, n.6) the decision to promote Dees was made by Steven Wawrzyniak, Respondent's Vice President of Technical Services, and Howard Nichols, the QC coordinator in Respondent's Birmingham plant. As reflected in the excerpts of Clements' deposition reproduced at pages 3 through 5 of the

petition, Clements' only involvement in the Dees promotion was temporarily to stay implementation of the decision already made by Wawrzyniak and Nichols pending investigation of a grievance filed by the union, and to deal with the union in the grievance procedure.

Additionally, Petitioners claim that they were "led to believe that a position as QC Tech was a 'stepping stone' to management with Doane . . . ." (Pet. 2.) The Petition fails to mention that the source of their information on that point was Harold Hilton, himself a Petitioner, who was not a member of Respondent's management but was instead a union official. (Pet. App. 33a.) Hilton's statement is incompetent as evidence. The Petition also neglects to mention that blacks were promoted to supervisory positions *without* experience as QC Techs (Pet. App. 19a), and that only two QC Techs were *ever* promoted to supervisory positions in the Birmingham plant. (Pet. App. 18a.) Furthermore, the only other Birmingham plant QC Tech promoted into supervision was Arthur Kendrick, an African-American, who was promoted to QC Coordinator of Respondent's Manassas, Virginia plant.

Petitioners also misrepresent the qualifications of Kenny Dees, who received the promotion in question. Dees had a year of college and, contrary to representations in the Petition, had taken high school chemistry. (Pet. App. 33a.) More importantly, however, the Petition fails to mention that Dees had three years of experience with another pet food company working in a lab with similar equipment, including a Technicon infrared analyzer, the most sophisticated piece of lab equipment used by Doane QC Techs. (Pet. App. 33a.) In that job, Dees performed tests similar to those performed by

Doane's QC Techs, logged test results and other information, and calibrated the equipment. (*Id.*) None of the Petitioners had comparable education or experience.

Moreover, the undisputed facts in the record show that the standards Respondent required of its QC Techs were not lowered for Mr. Dees. Although the Petition fails to state just how the standards were lowered, Petitioners argued in the district court that they had been told that QC Techs would be required to have two years of college. (Pet. App. 15a.) That alleged statement, however, was made, if at all, prior to the 1983 execution of a written agreement settling a grievance over the QC Tech position and removing it (*Id.* at 15a and n.3) from the bargaining unit. Regarding qualifications, the settlement simply says "the company must have qualified quality control technicians including among other things, certain formal education in chemistry, etc." (Pet. App. 9a-10a.) The district court correctly held that the parol evidence rule precluded altering this settlement agreement by evidence of prior negotiations, and petitioners presented no evidence of a requirement adopted thereafter that QC Technicians have attended college. (Pet. App. 15a, n.3.) Dees clearly met the requirements set out in the settlement agreement. Moreover, the record clearly reflects that at least one black without college, Gerson Lee, became a QC Tech in 1987, after the settlement agreement but before the promotion of Dees. (Pet. App. 11a.)

Petitioners' statement that the company allowed whites to build a shower on the premises of the Birmingham plant when blacks had asked for a shower for years is also inaccurate. As reflected in the district court's Memorandum Decision, any request for a shower came

not from these Petitioners, but from the union as exclusive bargaining representative of the integrated bargaining unit and could not lawfully be made just for blacks (*Id.* at 20a). The union contract was in evidence and contained no promise to install or not to install a shower, leaving it a matter of management prerogative whether to provide one. Moreover, the shower was constructed without knowledge of management (Pet. App. 19a-20a); no black was ever denied the right to use the shower, or the right to have a key to it (*Id.* at 20a).

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that there was no genuine dispute of material fact and that Respondent was entitled to judgment as a matter of law. The 1983 grievance settlement removing the laboratory employees from the bargaining unit could not be varied by parol evidence of prior negotiations. The Petitioners do not argue that they made out a *McDonnell-Burdine prima facie* case. Petitioners failed to show any nexus between Earl Clements' conciliatory remark during the 1993 grievance procedure, and the motivation for any promotion decision; they did not offer any legally sufficient statistical evidence, and failed to show any failure to follow a decision of this Court or any conflict among the Circuits in this sort of case. The Petition fails to state any reason why the writ should be granted.

ARGUMENT

Petitioners first argue that the writ should be granted because there is a split in the circuits regarding the interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) in the context of a motion for summary judgment. That argument is meritless on the face of the Petition. As Petitioners correctly note, nine circuits have interpreted *Hicks* to mean that a *prima facie* case, coupled with evidence on which a reasonable jury could disbelieve the defendant's articulated nondiscriminatory reasons for the actions in question, is sufficient to defeat a motion for summary judgment. While there are *dicta* in *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) and *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) to the effect that such a showing is not always sufficient to support a finding of discrimination, the petition itself reflects that the *holding* in each of those cases is consistent with the holdings in the other nine cases cited. In *Woods*, a failure to hire case, the First Circuit held that summary judgment was proper because the plaintiff had completely failed to rebut the defendant's explanation that those hired were more qualified than he. In *Rhodes*, the court held that the evidence was in fact sufficient to support a jury verdict in favor of the plaintiff. Those holdings are in no way inconsistent with the holdings in the cases petitioners claim are on the other side of the alleged split. Moreover, in neither case was the *dictum* on which petitioners rely necessary to the *holding* in the case. Examining the question in *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), the 11th Circuit stated as follows:

> The fact remains that the contrary dicta in the 1st and 5th Circuit decisions are just that: dicta. We have not found any holding of any circuit inconsistent with the holding of our *Hairston, Batey, Howard, Cooper-Houston* line of decisions, and at least eight other circuits have reached the same holding.

Id. at 1536.

In addition to the fact that there is no split in the circuits over application of *Hicks* to a case such as the present one, *Hicks* recognized that the role of the appellate court is no different in reviewing a judgment in a case to which the *McDonnell-Burdine* formula applies, than it is in any other civil case (509 U.S. at 524); including making the appropriate ruling in a case in which no reasonable jury could find intentional discrimination. The Circuits likewise recognize and follow this principle. *Benson v. Tocco, Inc.*, 113 F.3d 1203, 1210 (11th Cir. 1997); *Fisher v. Vassar College*, ___ F.3d ___, 74 FEP Cases 109, 116, 132, 146 n.12 (2d Cir. 1997) (*en banc*).[1] There is simply

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[1] *Fisher v. Vassar College, supra,* was a Title VII, ADEA, and EPA case which was fully tried in a bench trial. The Court of Appeals for the Second Circuit, sitting *en banc,* held that once the defendant employer introduced evidence of a legitimate reason for denying tenure at such a trial, "the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant," drops out of the picture, and is not to be resurrected later. The district court found that Vassar's asserted reasons were not the real reasons for denying her tenure, and that the real reason was intentional discrimination because of her age and status as a married woman. Although the panel decision of the Court of Appeals and the majority of the *en banc* court ruled that it could not find clear error in the district court's determination that certain of Vassar's assertions about

no evidence that the Respondent's decision makers did not believe they were selecting the best qualified person available for the QC Tech vacancy these six Petitioners say was wrongly filled. The Petitioners repeatedly said they did not want the job, they would not accept it if offered, that they would not last five minutes if selected, and some gave management the impression that they were anti-management and had said they would not accept a job outside the bargaining unit (Pet. App. 18a). Scant wonder that the district judge had the *déjà vu* feeling that the claim really being presented was the

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its decision were untrue, it found the totality of the evidence was insufficient to support the district court's finding that Vassar actually discriminated against Fisher on the basis of her age or her status as a married woman, basing its authority to do so on this passage of *St. Mary's Honor Center v. Hicks:*

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the fact-finder to answer, subject, *of course,* to appellate review – which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a). *Id.* at 524. (Emphasis the Supreme Court's.)

Since jury trial is available in a Title VII case under the 1991 amendments, the review of a jury verdict would be under the standard of whether any reasonable jury could find as the particular jury did. The present case does not involve the possible conflict in the circuits occasioned by the *Vassar College* case because this case was not fully tried and the question whether a prima facie case had been made had not dropped out of the case and there was no genuine issue of material fact as to pretext.

arbitration case all over again, seeking return of the laboratory employees to the bargaining unit. (Pet. App. 6a.) No matter how scrupulously one applies the *McDonald-Burdine* formula, in the final step in that reasoning process, there is simply no basis in the record on which a reasonable person could find Respondent discriminated against these six Petitioners in filling the QC Tech vacancy as it did.

Whatever the views of the various Circuits, the *Hicks* holding is inapplicable to this case, once again on the face of the Petition. *Hicks* held that the "fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination." 509 U.S. at 511. The *Hicks* holding, therefore, does not even come into play unless the plaintiff has established a *prima facie* case of discrimination. Here, however, the Petition itself states that "the district court dismissed the action and held that the appellants did not present a *prima facie* case because they all did not 'apply' for the QC Tech position" (Pet. 6), and then states that "appellants will not argue, at this stage, the *existence* of the *prima facie* case itself based on the authority of *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983)." (*Id.* at n.4.) That is a gross misconstruction of *Aikens*, which applies only to cases "fully tried on the merits," 460 U.S. at 714, and has nothing to do with whether a plaintiff must show by materials meeting the requirements of Fed.R.Civ.P. 56 the elements of a *prima facie* case to survive a motion for summary judgment. As the *Hicks* holding is predicated on

the existence of a *prima facie* case, and Petitioners do not even contend that they established such a case, there is no basis for granting the writ based on *Hicks*.

Even if the Petitioners had made out a *prima facie* case, their arguments that they submitted evidence sufficient to show pretext are meritless. As detailed in the Response to the Statement of the Case, *supra*, Respondent's articulated reason for promoting Dees was his excellent qualifications for the job, which none of the Petitioners possessed. Indeed, a statement of their qualifications is conspicuously absent from the Petition. Moreover, the "evidence" which they contend is sufficient to show that Respondent's articulated reason for promoting Dees was a pretext for discrimination simply will not bear inspection. As detailed in the statement of the case, Earl Clements' conciliatory statement in the March, 1994 grievance meeting is not evidence of discrimination with regard to the Dees promotion because there is no evidence that the statement was made in connection with the decision to promote Dees, and in any event, Clements was not a decisionmaker with respect to the Dees promotion. The evidence regarding the shower similarly is not probative of discriminatory animus: The record reflects without contradiction that any alleged request for a shower came from the union, as exclusive bargaining representative of the biracial bargaining unit, rather than from Petitioners; that the union contract contains neither a promise to install nor a promise not to install a shower, leaving it to management prerogative whether to install a shower available to members of both races, that the shower was constructed without the knowledge of management, and that no black was ever refused its use or

access to it. The response to the statement of the case also reflects the fallacy in petitioners' assertion that respondent lowered the QC Tech qualifications set out in the 1983 grievance settlement for Dees.

Petitioners also argue that "a noted animosity between the labor unit and the management" indicates pretext. That argument is a *non sequitur*. Petitioners do not even bother to argue, much less produce admissible evidence, that the alleged animosity was based on race. The bargaining unit has been racially integrated for decades. Animosity between labor and management is a common phenomenon in industry all over the world, regardless of ethnic considerations, and its existence is not probative of racial animus. Finally, Petitioners' statistical argument, based on the racial makeup of Respondent's workforce, is without probative significance because no attempt was made to introduce evidence of the racial composition of the qualified persons in the applicable labor market. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-51 (1989).

As the foregoing demonstrates, to the extent that the *Hicks* decision is applicable to the instant case, the district court properly applied that decision. It simply determined that there was insufficient evidence to support a finding of discrimination based on the lack of a *prima facie* case and, even if such case were established, the lack of evidence that the articulated reason for promoting Dees, namely that the QC Coordinator Nichols and Vice President for Technical Services, Wawrzyniak, believed Dees was best qualified, was a pretext.

CONCLUSION

Respondent respectfully submits that Petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that there was no genuine dispute of material fact and that Respondent was entitled to judgment as a matter of law.

Respectfully submitted,

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